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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1721

UNITED STATES OF AMERICA,

Petitioner,

—v.—

JOSEPH A. CHADWICK, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE CIVIL LIBERTIES UNION OF MASSACHUSETTS, *AMICI CURIAE*

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BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE CIVIL LIBERTIES UNION OF MASSACHUSETTS, AMICI CURIAE

Interest of Amici[1]

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 250,000 members, dedicated solely to defending the principles embodied in the Bill of Rights to the Constitution. The Civil Liberties Union of Massachusetts is the

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1. Letters of Consent from all parties to the filing of this brief have been lodged with the Clerk of the Court.

Massachusetts State affiliate of the American Civil Liberties Union.

Central among the protections of the Bill of Rights are the safeguards of privacy set forth in the Fourth Amendment. That Amendment erects a critical barrier between the government and the citizens, with well-defined procedures and standards which the government must follow whenever it seeks to intrude upon the "right of the people to be secure in their persons, houses, papers, and effects. . . ."

In recent years, the Fourth Amendment's barrier has, regrettably, been lowered considerably. The ACLU has repeatedly urged the Court to resist such "hydraulic pressures" to weaken the right of privacy which Mr. Justice Douglas warned against in Terry v. Ohio, 392 U.S. 1, 39 (1968). Now, once again, an assault on the Fourth Amendment is being made, this time in an effort to limit the warrant requirement to searches of homes, offices and private communications, turning it into the exception rather than the rule. We submit that the values protected by the Fourth Amendment require the rejection of this most recent effort to render the right of privacy largely meaningless.

Statement of the Case

This case involves the warrantless search of a 200-pound double-locked footlocker, resulting in the discovery of a large quantity of marijuana. The district court granted respondents' motions to suppress, ruling that the warrantless search of the footlocker fell within neither the automobile nor the search incident to an arrest exceptions to the warrant requirements. The Court of Appeals affirmed the suppression of the marijuana, holding that the search of the footlocker could not be justified as a valid search incident to arrest. It declined to create a new "luggage" exception to the warrant requirement.

Summary of Argument

Under established Fourth Amendment principles, a locked trunk or other closed container is fully protected by the warrant requirement. Law enforcement officers may not conduct a search of the contents without a warrant, irrespective of where the trunk or container is found.

The owner of an opaque, double-locked trunk has a justifiable expectation that the contents will remain private and unexposed, even in publicly accessible areas. United States v. Van Leeuwen, 397 U.S. 249 (1970); Katz v. United States, 389 U.S. 347 (1967); Ex Parte Jackson, 96 U.S. 727 (1878).

The Fourth Amendment requires that a disinterested judicial officer determine that there is probable cause to conduct a search and the permissible scope of the search. It precludes reliance on the judgment of law enforcement officers. United States v. United States District Court, 407 U.S. 297 (1972); Coolidge v. New Hampshire, 403 U.S. 443 (1971); Camara v. Municipal Court; 387 U.S. 523 (1971); Johnson v. United States, 333 U.S. 10 (1948). Post-search review is not an adequate substitute for prior judicial determination. United States v. United States District Court, supra; Coolidge v. New Hampshire, supra; Beck v. Ohio, 379 U.S. 89 (1964).

There are no exigent circumstances requiring the creation of an exception to the warrant requirement for locked trunks and closed containers. Adherence to the warrant procedure would not frustrate the achievement of any legitimate governmental purpose for measures to maintain the status quo pending the application for a search warrant are readily available. Moreover, such measures are constitutionally required, for temporary control over trunks and closed containers is less intrusive of individual privacy than search of their contents. United States v. Van Leeuwen, supra; Coolidge v. New Hampshire, supra; United States v. Jeffers, 342 U.S.

48 (1951); Taylor v. United States, 286 U.S. 1 (1932).

The factors and conditions which have been used to justify warrantless automobile searches are inapplicable to locked, opaque trunks and other closed containers. Even if automobiles can be considered analogous to locked trunks and closed containers, the automobile search exception does not apply to searches of automobiles where there is no possibility of removal or tampering. Coolidge v. New Hampshire, supra.

Finally, a 200-pound double-locked footlocker, several feet away from the arrestee, over which law enforcement agents have control, having seized the keys, is not within the immediate control of the arrestee. A search of an area from which weapons or destructible evidence can not be obtained is not a valid search incident to an arrest. Chimel v. California, 395 U.S. 752 (1969). The same test of "immediate control" applies whether the item seized and searched is located in a building or out of doors. Coolidge v. New Hampshire, supra; Chimel v. California, supra. The broader definition of "area of control" for which the Government argues has been expressly rejected as unsound. Chimel v. California, supra.

ARGUMENT

Introduction

The interests protected by the Fourth Amendment are squarely involved in this case and severely jeopardized by the Government's assertions. The essential purpose of the Fourth Amendment, as recognized in countless decisions of this Court, is "to maintain inviolate"[2] the privacy and security of individuals. See, e.g., United States v. Ortiz, 422 U.S. 891, 895 (1975); Camara v. Municipal Court, 387 U.S. 523, 528 (1967); Boyd v. United States, 116 U.S. 616, 630 (1886). This protection of individual privacy is basic to a free society and one of the unique values of our constitutional democracy. McDonald v. United States, 335 U.S. 451, 453 (1948). The protections afforded by the Fourth Amendment apply to people wherever they harbor a justifiable expectation of privacy, Katz v. United States, 389 U.S. 347 (1967), and the prohibitions of the Fourth Amendment act as a bar to all governmental invasions of that privacy. See, e.g., Terry v. Ohio, 392 U.S. 1 (1968); Boyd v. United States, supra at 630.

Whenever governmental officers seek to intrude upon individual privacy, the Fourth Amendment embodies a set of well-defined procedures and standards which must be followed. The cornerstone of this scheme is the warrant requirement, for "the most basic constitutional rule in this area is that '...searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable....'" Coolidge v. New Hampshire, 403 U.S. 443, 454-455 (1971) (quoting from Katz v. United States, supra at 357).

The issues in this case must be addressed with these principles in mind.

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2. Mapp v. Ohio, 367 U.S. 643, 657 (1961).

THE WARRANTLESS OPENING OF LOCKED PERSONAL PROPERTY VIOLATES THE FOURTH AMENDMENT.

Under established principles of Fourth Amendment jurisprudence, a locked trunk or other closed container is fully protected by the warrant requirement. So long as the owner reasonably expects the contents to remain unexposed, police officers may not conduct a search of those contents without a warrant, irrespective of where the trunk or container is found.

A. There is a justifiable expectation of privacy in locked trunks and closed containers, wherever found, which is protected by the Fourth Amendment.

The Fourth Amendment embodies a concept of personal privacy the scope of which extends to all items which an individual justifiably expects will be shielded from public view. As Justice Rehnquist has written, the protection encompasses "items the individual owner or possessor has chosen to keep private and away from prying eyes, either official or unofficial." Rehnquist, "Privacy and Effective Law Enforcement," 23 Kansas L. Rev. 1, 4 (1974). Thus, the reasonable expectation of the owner or possessor is a key factor in determining the applicability of Fourth Amendment protections.

In Katz v. United States, supra, this Court held that an individual in a closed, public phone booth was entitled to the full panoply of Fourth Amendment protections. The Court rejected an analysis limiting the scope of constitutional privacy to "protected areas," holding that it was the intention of the individual that triggered Fourth Amendment protection:

> For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home

> or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. (Footnotes omitted). Katz v. United States, supra at 351.

The reasonable expectation of privacy analysis has been consistently applied to closed packages and containers for nearly 100 years. In Ex Parte Jackson, 96 U.S. 727 (1878), the Court found unconstitutional a warrantless search of first class mail. Because the sender had sealed papers inside an opaque container, he expected those papers to be shielded from public view, and Fourth Amendment protections were fully applicable.

> Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domicils. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. 96 U.S. at 733.

A century later the same rationale was applied in United States v. Van Leeuwen, 397 U.S. 249 (1970), where a unanimous Court found that a sealed, first class mail package marked "COINS" deserved full Fourth Amendment protection. The sender's interest was in the privacy of the contents of the package. Despite the clear marking on the outside of that package, any government intrusion into the expected area of privacy within the package was forbidden without a search warrant. 397 U.S. at 253.

For the same reasons, an individual who places

his personal effects inside an opaque trunk and double locks that trunk has a justifiable expectation that the contents will remain private. Closed against official or unofficial inspection, the contents are protected regardless of the fact that the trunk is located in a publicly accessible area. This conclusion is compelled by the holding in Katz v. United States, supra.

The Government seeks to avoid this conclusion by contending that Katz, supra, Ex Parte Jackson, supra, and Van Leeuwen, supra, stand for the proposition that only private communications[3] via telephone and first class mail are within the scope of privacy protected by the Fourth Amendment. But there is nothing in any of these cases to indicate that the Court contemplated such a severe limitation. Indeed, it would be nonsensical to find, as the Government theory implies, that an individual's privacy interest in a sealed package is secure only when that package is in the hands of federal employees, i.e. postal officers. See, e.g., Ex Parte Jackson, supra. The individual on his way to or from the post office, and the individual who delivers his own package or sends it via a private carrier, should both be accorded full Fourth Amendment protection.

A theory that the Fourth Amendment only protects private communications cannot possibly explain the Court's unanimous decision in Van Leeuwen, supra. No communications of any sort, written or oral, were involved as the package clearly indicated

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3. Although the Government in this case takes the position that private communications are within the "core" of privacy protected by the Fourth Amendment, in United States v. Ramsey, No. 76-167, the Government has taken a contrary position that there is no privacy interest in international communications and that such communications may be searched absent a warrant, probable cause or even reasonable suspicion.

it contained only coins. A warrantless search was forbidden because the sender expected the contents to remain unexposed.

The Government's position would leave the individual secure in his personal belongings only when he is within a home or office. This is a position that this Court has resolutely rejected by holding that the Fourth Amendment "belongs as much to the citizen on the streets of our cities as to the home owner closeted in his study to dispose of his secret affairs." Terry v. Ohio, supra at 8-9 (1968). Moreover, such a narrow definition of privacy is totally unworkable in a vibrant, mobile society. Our citizens are constantly making trips which require the movement of personal belongings. If the individual has a reasonable expectation of privacy only in his home, his right to move about in society becomes severely limited.[4] Moving from one home to another, or from home to office, would entail a serious surrender of privacy.[5]

The Government concedes that probable cause is required to search the contents of locked trunks and closed containers, in effect conceding that the owner has a justifiable expectation of privacy in

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4. The right to travel has been accorded constitutional status by this Court. See Shapiro v. Thompson, 394 U.S. 618 (1969); United States v. Guest, 383 U.S. 745 (1966).

5. Restrictions on outdoor privacy would also discriminate against those who have no fixed dwelling. The nonconformists in America who live in mobile homes, who live in cars, or who simply carry all their belongings with them, deserve the same personal privacy with respect to papers and effects as do more conventional citizens. See Papachristou v. City of Jacksonville, 405 U.S. 156, 163-64, 170 (1972).

these belongings. Petitioner would, however, separate the probable cause requirement of the Warrant Clause from the procedure for judicially predetermining the existence of probable cause. Amici submit that the two are inseparable for probable cause means judicially determined probable cause. Deviation from the warrant requirement may be excused only upon a convincing showing that warrantless search is imperative.

B. The Fourth Amendment requires prior judicial determination of probable cause and the scope of search.

Though it is now "axiomatic" that the warrant is paramount in the protection of individual privacy, Almeida-Sanchez v. United States, 413 U.S. 266, 277 (1973)(Powell, J. concurring), the Government seeks to eliminate the warrant requirement in all searches conducted outside the home or office. But the Warrant Clause "touches the very heart" of the Fourth Amendment, United States v. United States District Court, 407 U.S. 297, 316 (1972), and without its protections, individual privacy is jeopardized.

1. Authorization of the search

While conceding that probable cause is required to search personal property, it is the Government's position that the law enforcement officer's determination of probable cause is sufficient protection against the initiation of unreasonable searches. Amici submit that the purpose of the warrant requirement and the decisions of this Court construing and applying it eschew reliance on executive determination of probable cause and firmly establish that the essence of the Fourth Amendment's protection against unreasonable searches lies in the determination of probable cause by a neutral, judicial official.

The reason for the rule requiring adherence

to judicial process emerges from the purpose of the Fourth Amendment. It prohibits governmental breach of individual privacy absent a showing of compelling public necessity expressed in terms of "probable cause." Probable cause is an objective standard which requires a careful, dispassionate evaluation of the available facts which make the proposed official action reasonable.

The duty and responsibility of executive officials is to enforce the law by investigating and prosecuting those suspected of unlawful acts. Because of the nature of these responsibilities, officers have a subjective interest in obtaining evidence. They are likely, due to the ineluctable pressures of their duties, to overestimate the necessity for search and undervalue the individual's privacy interest. Consequently, it is inappropriate to rely upon them to make the careful, objective determination of probable cause required by the Fourth Amendment.

Even English law predating the Constitution proclaimed that "it is not fit that the receiving or judging of the information should be left to the discretion of the officer." Leach v. Three of the King's Messengers, 19 How. St. Tr. 1001, 1027 (1765). Similarly, this Court has repeatedly recognized that security against unlawful searches cannot be maintained by reliance on the judgment of officials engaged in the competitive enterprise of the pursuit of crime. E.g., Johnson v. United States, 333 U.S. 10, 14 (1948); United States v. Lefkowitz, 285 U.S. 452, 464 (1932).

Thus, the chief function of the warrant requirement is to take the determination of the existence of probable cause for the initiation of a search out of the hands of law enforcement officials and place it in the hands of an objective, neutral party -- a judicial officer. This Court has consistently and unwaiveringly recognized that the essence of the protection afforded by the Fourth Amendment lies in this requirement of prior

determination of probable cause by a disinterested magistrate. E.g., United States v. United States District Court, supra; Katz v. United States, supra; Camara v. Municipal Court, supra at 528-529, 533-34; Johnson v. United States, supra. Never has the determination of probable cause by an executive officer been deemed to provide adequate protection.

In United States v. United States District Court, supra, this Court emphasized the importance of prior judicial determination by holding that a search authorized by the President undertaken for the purpose of safeguarding national security cannot go forward absent a warrant issued by a judicial officer. As the Court stated: "The Fourth Amendment contemplates a prior judicial judgment [of reasonableness], not the risk that executive discretion may be reasonably exercised" because "executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy." 407 U.S. at 317. (Footnote omitted.) The same lack of neutrality has been found fatal to a search warrant issued by a state attorney general in his capacity as a justice of the peace. In Coolidge v. New Hampshire, supra at 450, the Court reemphasized that "the whole point of the basic rule [requiring judicial determination that a search is justified]... is that prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigations -- the 'competitive enterprise' that must rightly engage their single-minded attention." (Footnote omitted.)

Only this Term, the Court repeated that the Fourth Amendment is violated whenever the determination of probable cause is made by an interested party. In Connally v. Georgia, 45 U.S.L.W. 3461 (U.S. Jan. 11, 1977), the Court held that a search pursuant to a warrant issued by a justice of the peace who had a pecuniary interest in its issuance violated the Fourth Amendment.

The warrant requirement may also serve to an-

nounce the officer's authority to search, the need to search, and the limits of the power to search. See Camara v. Municipal Court, supra at 532. Although in the instant case, the officers did not seize the footlocker until it had been claimed by its owner, the principle which the government urges would have a broader application. It would apply to freight delivered to a carrier for transportation. For instance, it would have applied had respondents shipped the footlocker to Boston without accompanying it. In such circumstances, a warrant would serve the valuable function of informing the third-party carrier of the agent's authority. See, e.g., United States v. Van Leeuwen, supra; United States v. Palazzo, 488 F.2d 942 (5th Cir. 1974); United States v. Garay, 477 F.2d 1306 (5th Cir. 1973).

2. Scope of the search

In addition to limiting the initiation of intrusions on privacy, the warrant requirement serves the separate and distinct function of confining within precise limits those searches found to be necessary. Here, the issue is preventing an otherwise permissible intrusion from degenerating into an indiscriminate rummaging through a person's belongings. See, e.g., Coolidge v. New Hampshire, supra at 467; Marron v. United States, 275 U.S. 192, 196 (1927). The Government contends that there is no danger of a wide-ranging search outside the home because only small containers with few items would be subject to search. Brief for Petitioner at 45.

There is absolutely no basis for this assertion. Huge trunks, boxes, and metal containers of all types are available for the transportation of personal effects. Indeed, when an individual changes his residence, he places all his personal belongings in containers for out-of-doors transportation. Thus, any single trunk or container may contain a multiplicity of personal effects. Moreover, any single container may contain other closed

or locked containers. Wherever such a large assortment of personal belongings potentially encompassed in additional closed containers can be found, there is a danger of the wide-ranging, indiscriminate search which the warrant requirement is designed to prevent.

This case illustrates the fallacy of the Government's argument that a warrant is not necessary to limit the scope of the search of closed containers. The 200-pound footlocker could easily have contained all of the owner's worldly goods.[6] Moreover, the agents did not limit the scope of their search to the container for which they had probable cause; they extended it to include additional closed containers, two suitcases, for which they concededly did not have probable cause to search.

3. Inadequacy of the alternatives

The Government recognizes that, on occasion, law enforcement officers will err in their evaluation of probable cause. In these instances, the Government contends, adequate substitutes for the warrant requirement are provided by post-search judicial review and individual damage actions against the offending officers. This argument, however, ignores one of the fundamental purposes of the warrant requirement -- the prevention of unjustified intrusions upon the privacy of citizens. Chimel v. California, 395 U.S. 752, 767 n.12 (1969). In the first instance, "the magistrate's scrutiny is intended to eliminate altogether

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6. That it contained marijuana is irrelevant, for the agents did not know that until after they searched it. Giving weight to this fact in effect would justify the search by what is turned up, an analysis this Court has steadfastly refused to accept. See, e.g., Sibron v. New York, 392 U.S. 40, 63 (1968); Henry v. United States, 361 U.S. 98, 103 (1959).

searches not based on probable cause. The premise here is that any intrusion in the way of search or seizure is an evil, so that no intrusion at all is justified without a careful prior determination of necessity." Coolidge v. New Hampshire, supra at 467.

Even ignoring the preventive function which the warrant requirement is designed to serve, the Government's proposed alternatives are still not adequate substitutes for the warrant requirement. This Court has repeatedly recognized that post-search judicial review is not an acceptable substitute for a neutral predetermination of probable cause. See, e.g., United States v. United States District Court, supra; Katz v. United States, supra. An after-the-fact examination of the circumstances leading to a warrantless search is inherently less reliable than an objective predetermination.

Since the Government seeks broad power to search private property found anywhere outside the home, it is possible the search may occur in the absence of the owner. In such a case, the officer's recollections of the basis for his actions cannot be tested, for he may be the only witness to the search. Also, all too often, post-search hearings are "likely to be subtly influenced by the familiar shortcomings of hindsight judgment." Beck v. Ohio, 379 U.S. 89, 96 (1964).

Moreover, post-search review, inadequate as it is, can never cure or provide redress for unconstitutional searches that reveal no evidence of crime. The exclusionary rule provides no remedy for the law-abiding citizen who is the victim of an unjustified intrusion into privacy. To this the Government's only answer is that such a person would be adequately protected because "an officer who acts without probable cause may be forced to answer in damages." Brief for Petitioner at 45 n.32. The Fourth Amendment is a positive restraint on government the enforcement of which should not turn on

the ability and desire of individuals to involve themselves in expensive and time-consuming litigation. The protection of constitutional rights is not and should not be the task of the citizen. Cf., Blount v. Rizzi, 400 U.S. 410 (1971); Freedman v. Maryland, 380 U.S. 51 (1965). The Fourth Amendment puts the burden on the government.

In sum, the best protection of privacy, especially for the poor and unsophisticated who are unlikely to sue public officials, is a pre-search determination of probable cause by a neutral magistrate.

In effect, the Government contends simply that the initiation and scope of the search of closed containers should be determined by the police officer on the beat, subject only to the good faith exercise of his discretion in determining the existence of probable cause and the permissible scope of search. However, this Court has consistently refused to make good faith the measure of the Fourth Amendment. "[S]imple 'good faith on the part of the arresting [or searching] officer is not enough.' ...If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects' only in the discretion of the police." Terry v. Ohio, supra at 22.

The purpose of the rule requiring prior judicial authorization for search is to provide a check on the exercise of official discretion. Whenever a police officer selects an object for search he is exercising discretion and, where feasible, the Fourth Amendment requires that he obtain pre-search judicial review of the reasonableness of his action.

C. There is no justification for creation of an exception to the warrant requirement for closed containers.

The warrant requirement is subject to a 'few

specifically established and well-delineated exceptions.' The exceptions are 'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption...that the exigencies of the situation made that course imperative.'" Coolidge v. New Hampshire, supra at 455 (footnotes omitted). Recognizing that none of the established exceptions applies to the search in this case, the Government urges this Court to create new exceptions. In order to justify the creation of an exception to the warrant requirement, it is necessary for the Government to establish, at the very least, that the warrant procedure would frustrate the purpose behind the search. E.g., United States v. United States District Court, supra at 315; Camara v. Municipal Court, supra at 533. Amici submit that subjecting the search of closed containers located in public places to the warrant requirement would not frustrate any legitimate governmental interest.

1. Adherence to the warrant requirement would not frustrate the governmental purpose in searching closed containers.

The question here is whether the warrant requirement would frustrate the governmental purpose justifying the search either because a search would not be possible if not performed immediately or because a delayed search would not effectuate the intended purpose. Applying this test, the sole circumstance which purportedly justifies dispensing with the warrant requirement for searches of closed containers located in public places is their mobility -- that they could be removed or tampered with before a warrant could be obtained.

But there are a variety of ways in which closed containers may be immobilized, preserving the status quo, until a search warrant may be obtained. This Court has, on a number of occasions, accommodated law enforcement interests by permitting po-

lice officers to exercise control temporarily over closed containers and areas until a search warrant may be obtained. This procedure adequately satisfies the governmental need without completely dispensing with the vital constitutional shield of a search warrant.

For example, in Taylor v. United States, 286 U.S. 1 (1932), a unanimous Court found unconstitutional a warrantless probable cause search of a garage located on private property. The Court ruled that the police had ample opportunity to obtain a warrant without any risk to the evidence within the garage because officers could stand guard at the site to prevent tampering. Accord, United States v. Jeffers, 342 U.S. 48 (1951). The rationale which underlies the rule permitting temporary police control over private premises is that it is the least intrusive means of protecting evidence without a complete invasion of privacy. The greater intrusion by government officials, the actual search of papers and effects, is forbidden in the absence of a search warrant.

The temporary control approach is equally applicable to movable items such as vehicles and closed containers. Police may place a twenty-four-hour guard on an automobile in order to prevent removal, but they may not search without a warrant. Coolidge v. New Hampshire, supra. Likewise, a closed container concealing personal property may be temporarily held pending application for a warrant. United States v. Van Leeuwen, supra. Postal authorities, acting on probable cause, detained a package labeled "COINS" for 29 hours while a search warrant was sought. The Court approved this procedure, finding that the package owner's significant Fourth Amendment interest was in the privacy of the contents. Accordingly, detention was constitutional, although a warrantless search would not have been.

Thus, this Court has recognized that potential mobility alone does not justify a warrantless search.

Rather, it has insisted that protection from the removal or destruction of evidence must be pursued by police action to preserve the status quo pending the application for a search warrant. Through this procedure, the governmental purpose in undertaking a search will not be frustrated.

Despite the recognition that immobilization of chattel until a warrant is obtained is the minimally constitutional course, the Government argues, relying on Chambers v. Maroney, 399 U.S. 42 (1970), that a full search of the contents of a container is as reasonable as a temporary detention or seizure.

To reach this conclusion, the Government further contends that locked trunks are analogous to automobiles for Fourth Amendment purposes. The automobile exception to the warrant requirement, however, has been carefully developed and specifically limited, and its rationale is totally inapplicable to a locked trunk or other closed container.

The rationale for the exception is twofold. It stems from the inherent mobility of an automobile, creating circumstances in which, as a practical necessity, police application for a warrant might enable a suspect or accomplice to remove evidence. For example, the officers in Carroll v. United States, 267 U.S. 132 (1925), stopped defendants' car on a highway with probable cause to search but without making any initial arrests. In those circumstances, the officers could not leave the scene to obtain a warrant, 267 U.S. at 159, and an on-the-spot search was held to be constitutionally valid. The Court has held that an additional reason for permitting warrantless automobile searches is that the pervasive state regulation of vehicles and the public exposure of the inside of the auto through the windows limit the driver's expectation of privacy. South Dakota v. Opperman, 96 S.Ct. 3092, 3095-96 (1976).

Where an on-the-spot search is valid under Carroll, supra, but where conditions at the scene

of the initial seizure would make a search dangerous or difficult, this Court has indicated that the police may transport the automobile back to the stationhouse and then proceed with the search. Chambers v. Maroney, supra; Texas v. White, 423 U.S. 78 (1975)(per curiam). Once a right to search at the scene exists, that right does not disappear simply because of a police practice designed to protect officers and the suspect's property. The warrantless stationhouse search in Chambers, supra, was constitutionally valid only because of the officers' power to search at the scene of the original seizure. Texas v. White, supra.

But the Chambers Court did not, as the Government suggests, provide a basis for a repeal of the warrant requirement in all out-of-doors searches. The holding was carefully limited to those situations in which an initial search was permissible. Far from offering a rationale to justify all warrantless, probable cause searches, the Court refused even to find that automobile searches were totally immune from the warrant requirement:

> Neither Carroll, supra, nor other cases in this Court require or suggest that in every conceivable circumstance the search of an auto even with probable cause may be made without the extra protection for privacy that a warrant affords. Chambers v. Maroney, supra at 50.

The Court did not deviate from the established Fourth Amendment principle that warrantless searches are presumptively unreasonable. "Every word in the opinion indicates the Court's adherence to the underlying rule and its care in delineating a limited exception." Coolidge v. New Hampshire, supra at 479.

One of the limitations to the automobile exception was clarified in Coolidge, supra, where the Court held unconstitutional a probable cause search

of defendant's automobile. The Court found that, at the time of the initial seizure of the automobile in defendant's driveway, there were not exigent circumstances to allow the police to search without a warrant. Defendant was in custody and his automobile was guarded against tampering. Though the car was still technically mobile, the Court refused to attach any constitutional significance to the simple fact of mobility since, with the guard, there was no chance of removal. 403 U.S. at 461 n.18. Chambers, supra, was found inapplicable since it held that "where the police may stop and search an automobile under Carroll, they may also seize it and search it later at the police station." Id. at 463 (footnote omitted).

The complete inappropriateness of the automobile exception to this case is made clear by an examination of the second rationale for the exception: the limited expectation of privacy. There obviously could be no state regulation of trunks that would result in noncriminal examination and inspection of the sort required for automobiles. The owner of a trunk can confidently and reasonably assume that his locked container will not be subject to the safety or licensing laws applicable to moving vehicles. Cf., South Dakota v. Opperman, supra. The owner of the trunk can be certain, by choosing an opaque container protected by a lock, that the contents will not be exposed to the public. The automobile owner does not have this choice; the glass windows of his car serve to reduce his ability to limit public exposure.

Finally, the primary function of the automobile is transportation. It "seldom" serves as a "repository of personal effects." Cardwell v. Lewis, 417 U.S. 583, 590 (1974). In sharp contrast, the primary and only function of a locked trunk is to serve as a secure repository of personal effects.

It is apparent that requiring adherence to the warrant requirement in situations where warrantless temporary detentions are permissible would not in

any way frustrate the legitimate law enforcement objectives of the police. There is no danger that the evidence would disappear. Moreover, the warrant requirement does not impose any insuperable impediment to effective law enforcement since the authority to undertake warrantless searches is no greater than the authority to search with a warrant. Facts amounting to probable cause for a warrantless search will always justify the issuance of a warrant. There is no burden on the state to meet this requirement except the inconvenience to the officers and the delay necessary to prepare the papers and present the evidence. Johnson v. United States, supra at 15. Inconvenience can never be the measure of the duty to obtain a search warrant.

> The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefits of a written Constitution and undermine the bases of our Government. Reid v. Covert, 354 U.S. 1, 14 (1957).

2. The warrantless search of respondents' trunk cannot be justified as a valid search incident to arrest.

The search of respondents' 200-pound, double-locked footlocker, which federal agents had not seen opened, was constitutionally broader than a permissible search incident to arrest. Recognizing this the Government contends that a broad "area of control" standard should be adopted for the search of personal belongings located outside the home. This approach is inconsistent with the rationale of the search incident to arrest exception and at odds with many rulings of this Court.

The warrantless search incident to arrest is justified by the inherent necessities of the situation at the time of arrest. The arresting officer is permitted

a limited search to prevent access to weapons and destructible evidence. Chimel v. California, supra. This general exception to the warrant provision involves two distinct branches: search of the person of the arrestee and search of the area within the immediate control of the arrestee. United States v. Robinson, 414 U.S. 218, 225 (1973). The latter search is, by definition, limited to a search of the area "into which an arrestee might reach . . . . the area from within which he might gain possession of a weapon or destructible evidence." Chimel v. California, supra at 763.

A double-locked trunk several feet away from the arrestee, which the officers had never seen opened and which they had control over, having seized the keys, cannot be within the area so defined. The facts indisputably establish that there was no danger whatever that the arrestees could have reached into the locked footlocker, and the Government has offered no plausible basis for making this assumption.

The Government's broad test of "area of control" is identical to that applied by the Court in United States v. Rabinowitz, 339 U.S. 56 (1950) and Harris v. United States, 331 U.S. 145, 164 (1947). But both of these cases were expressly overruled as unsound in Chimel v. California, supra. Thus, for constitutional purposes, an arrestee is in possession only of those items on his person or within his immediate control. Searches into closed drawers and containers beyond the reach of the arrestee, as in this case, may be made only under authority of a warrant. Chimel v. California, supra at 763.

The Government attempts to distinguish Chimel, supra, on the grounds that the agents in the instant case had probable cause both to arrest the defendants and to suspect that the trunk contained contraband, and that the trunk was found outside the home. Brief for Petitioner at 57. In these circumstances, the Government would place no limitation on the agents' right to search; all of an arrestee's possessions, regardless of their proximity to the

place of arrest, would be subject to warrantless, probable cause search.

This Court has not signaled any retreat from Chimel and has not restricted its application to indoor searches. Chimel has been cited with approval in situations not involving a search of a dwelling, see e.g., United States v. Robinson, supra at 225-26, and lower courts have readily assumed its applicability to all arrest situations. See, e.g. United States v. Rothman, 492 F.2d 1260, 1265-66 (9th Cir. 1973); United States v. Colbert, 454 F.2d 801 (5th Cir. 1972), rev'd on other grounds, 474 F.2d 174 (1973) (en banc).

Indeed this Court has, when reviewing similar factual situations, rejected the Government position. The police in Coolidge v. New Hampshire, supra, had probable cause both to arrest and to search, yet the Court refused to allow a search of personal effects found outside the home. 403 U.S. at 473. The Court indicated that "[t]here can be no question that after Chimel such a search could not be justified as 'incident' to the arrest. . . ." 403 U.S. 457 n. 11. Since Chimel applied only prospectively, however, Coolidge v. New Hampshire, supra, was decided under pre-Chimel law and applied the broader area of control doctrine of United States v. Rabinowitz, supra. That is, Coolidge applied the precise standard for which the Government here contends and the search nonetheless was found unconstitutional.

The Chimel court explicitly answered the Government's indoor-outdoor distinction:

> No consideration relevant to the Fourth Amendment suggests any point of rational limitation, once the search is allowed to go beyond the area from which the person arrested might obtain weapons or evidentiary items. The only reasoned distinction is one between a search of the person arrested and the area within his reach on the one hand, and more extensive searches on the other. 395 U.S. at 766 (footnotes omitted).

Chimel's limitation on the scope of a search incident to arrest cannot be overcome by arbitrary distinctions that have no constitutional significance.[7] As the Court in Chimel recognized, there is "no reason why, simply because some interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions should automatically be allowed despite the absence of a warrant that the Fourth Amendment would otherwise require." 395 U.S. at 766 n. 12. Inasmuch as the footlocker was not within the area from which a weapon or evidence could be obtained, the warrantless search cannot be justified as a valid search incident to arrest.

D. The history of this Court's Fourth Amendment jurisprudence requires adherence to the warrant requirement.

For its argument that warrantless searches are not per se unreasonable under the Fourth Amendment, the Government relies on its reading of the history which led to the Amendment's adoption.[8] What the Government ignores is the 100 years of this Court's Fourth Amendment jurisprudence construing and applying the rights guaranteed. Amici submit that the

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7. It should be noted that the arrest was warrantless and it was the probable cause to believe the footlocker contained contraband which provided the basis for the arrest. In terms of the Fourth Amendment's warrant requirement, it could be argued that Chimel presented a stronger case for a warrantless search because the arrest was made pursuant to a valid warrant. Thus, a neutral magistrate had determined the existence of probable cause, a factor totally absent in the instant case.

8. Amici do not agree with the Government's historical interpretation, however, a point-by-point refutation is unnecessary for it is the construction and application of the Fourth Amendment by this Court that is the significant and controlling history.

answer to the question presented is to be found in this jurisprudential history.

This Court has repeatedly emphasized that there are two fundamental principles embodied in the Fourth Amendment. First, the "basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." Camara v. Municipal Court, supra at 528. E.g., United States v. Ortiz, supra at 895; United States v. United States District Court, supra at 312-313; Mapp v. Ohio, 367 U.S. 643, 657 (1961); Wolf v. Colorado, 338 U.S. 25, 27 (1949); McDonald v. United States, supra at 453; Boyd v. United States, supra at 630. As Justice Brandeis proclaimed, "as against the government," the Fourth Amendment confers "the right to be let alone--the most comprehensive of rights and the right most valued by civilized men." Olmstead v. United States, 277 U.S. 438, 478 (1928) (dissenting opinion).

Second, the Fourth Amendment's warrant requirement embodies the principle that the determination of when that right to privacy must yield is to be decided by a judicial officer and not a law enforcement agent. E.g., G.M. Leasing Corp. v. United States, 45 U.S.L.W. 4098, 4102 (U.S. January 11, 1977); Almeida-Sanchez v. United States, 413 U.S. 266, 279-285 (1973) (Powell, J., concurring); United States v. United States District Court, supra; Katz v. United States, supra; Camara v. Municipal Court, supra at 528-29, 533-34; United States v. Rabinowitz, supra at 82) (Frankfurter, J. dissenting); McDonald v. United States, supra; Johnson v. United States, supra. Accordingly, "[s]earches conducted without warrants have been held unlawful 'notwithstanding facts unquestionably showing probable cause' . . ." Katz v. United States, supra at 357 (quoting from Agnello v. United States, 269 U.S. 20, 33 (1925)). So firmly established is this principle that this Court has stated: "[T]he

most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment. . . ." Coolidge v. New Hampshire, supra at 454-455.

It is this rule which the Government here challenges. It argues, in effect, that searches without warrants are per se reasonable subject only to three exceptions--the search of a home, office or private communications. It argues that the Court really did not mean what it said in Coolidge v. New Hampshire, supra, and that the authors of the Bill of Rights did not intend such a rule. It is sufficient response to this argument to quote the Coolidge Court's answer:

> In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or "extravagant" to some. But the values were those of the authors of our fundamental constitutional concepts. In times not altogether unlike our own they won--by legal and constitutional means in England, and by revolution on this continent--a right of personal security against arbitrary intrusions by official power. If times have changed, reducing everyman's scope to do as he pleases in an urban industrial world, the changes have made the values served by the Fourth Amendment more, not less, important. 403 U.S. at 455 (footnotes omitted).

The government argues further that the opportunity to procure a warrant is immaterial and that the relevant test under the Fourth Amendment is whether the search was reasonable. There is no better response to this argument than that given by Justice Powell:

> This view, however, overlooks the second clause of the Amendment. The warrant clause of the

> Fourth Amendment is not dead language. Rather, it has been "a valued part of our constitutional law for decades, and it has determined the result in scores and scores of cases in courts all over the country. It is not an inconvenience to be somehow "weighed" against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the 'well-intentioned but mistakenly overzealous executive officers' who are a part of any system of law enforcement." United States v. United States District Court, 407 U.S. at 315-16.

The Fourth Amendment arose as a response to arbitrary government intrusion into individual privacy. It is couched in general terms as a broad restraint on all forms of official intrusion. In over 100 years of Fourth Amendment jurisprudence, this Court has defined and applied the Amendment's general principles. It is the history of that jurisprudence which must guide the resolution of the issues posed by this case, and that history compels the conclusion that a warrant is required before law enforcement officials may search closed containers and locked trunks.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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